IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 17912 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE K.A.PUJ Sd/-

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	Tho be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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GANESH KESHA HANATH - Petitioner
Versus
KANTABEN WD/O.LAKHMAN HANATH - Respondent

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Appearance :
MR HARDIK SONI for MR HARIN P RAVAL for Petitioner.

MR BHUSHAN B OZA for Respondent.

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CORAM :	HONOURABLE MR.JUSTICE K.A.PUJ

Date : 12/06/2007
ORAL JUDGMENT

1. The petitioner – original plaintiff has filed this petition under Article 227 of the Constitution of India praying for quashing and setting aside the order dated 21.04.2005 Annexure F to the petition, rendered by the learned Joint District Judge and Fast Track Court, Gandhidham – Kutch in Civil Misc. Appeal No. 09 of 2002 whereby he has allowed the appeal and quashed and set aside the order passed by the learned Trial Judge below an application Exh.5 in Regular Civil Suit No. 72 of 2000.

2. This Court has issued notice on 07.09.2005. On 15.09.2005, this Court has observed on the basis of the submissions made by learned advocate Mr. Harin Raval for the petitioner that other side has refused to accept the process of the Court when she was

attempted to be served by direct service. The Court, therefore, issued fresh notice for final disposal to the unserved respondent. On 07.10.2005, learned advocate Mr. Bhushan B. Oza has stated before the Court that he has an instruction to appear on behalf of respondent – Kantaben Wd/o. Lakhman Hanath who was present before the Court in person and he assured the Court to file his formal appearance in the matter. The Court, therefore, directed the Registry to show the name of Mr. Bhushan B. Oza, learned advocate appearing for the respondent. On 10.10.2006, after hearing Mr. Raval, the Court has admitted the petition and rule was issued. However, nobody was present on behalf of the respondent.

3. The brief facts giving rise to the present petition are that the petitioner is the original plaintiff who instituted Regular Civil Suit No. 72 of 2000 in the Court of the learned Civil Judge (S.D.), Anjar – Kutch against present respondent and the Mamlatdar, Bhachau – Kutch, as defendants. In the said plaint, it

is the case of the petitioner that he is the resident of village Vandhiya and since ancestral time is engaged in the occupation as an agriculturist and possesses agricultural land as owner. The respondent herein is also resident of the same village whose husband expired prior to some years. Both the petitioner and respondent belong to one family.

4. It is also the case of the petitioner that there is land of the ownership and in occupation, possession and cultivation of the petitioner admeasuring 2 Hectare 12 ARE and 46 Sq. Mts. being Survey No. 469. On the western boundary of the petitioner's agricultural field, there are two agricultural lands bearing Revenue Survey Nos. 475/1 and 475/2 belonging to one Hanath Vinod Kheta and Kantaben respectively. It is also the case of the petitioner that since ancestral time, agricultural operations are being carried out in the petitioner's name and is found in the revenue records. That from the western side of the petitioner's field, there is a Kachcha Cart road

used since time immemorial for the purposes of going to the field of the petitioner. This was more particularly described in paragraph 4 of the plaint. This Kachcha Cart road is used since times immemorial and at least for a period of more than 20 years prior to filing of the suit. It is further alleged that to the western side of the petitioner's field, there is a public road which is a State highway and the agricultural field of the petitioner is to the eastern side of the respondent's field. With a view to reach the petitioner's field from the public State highway, it is necessary and it has been regularly used so to travel through field of the respondent. There is no other road or way to reach the agricultural field of the petitioner. It is also the case of the petitioner that without any hindrance or interference, since the ancestral time of the petitioner and respondent, both of whom belong to one family of ancestors, the petitioner and prior thereto his ancestors were using the way to reach their agricultural field through the Kachcha Cart road. It is also alleged that prior to filing of the suit

at no point of time in the past, the petitioner or his ancestors were estopped from using that road. Thus the right to use land through Kachcha Cart is claimed as a right of way through easement prescription, but as on 11.08.2000, as the defendant No. 1 had stopped the petitioner from using the said road to reach his agricultural field, the petitioner was constrained to institute the suit inter alia praying for a declaration and permanent injunction. It was prayed that it be declared that the petitioner-plaintiff has easementary right by prescription to use the Kachcha Cart road passing through the land of Revenue Survey No. 475/1 on its northern boundary to reach the petitioner's agricultural land and for permanent injunction restraining the defendant No.1, her servants and agents from entering with the plaintiff's right of way. Further relief was prayed to restrain the original defendant No. 2 - Mamlatdar from passing any order without hearing the petitioner in the matter of the said road. Along with the said suit, an application for injunction Exh.5 was also filed. Affidavits of the contiguous land owners

Shri Sodha Bechra Bau and Devda Madeva Govind which were produced on record of the Trial Court are also produced before this Court along with the petition.

5. The learned Trial Judge considered the pleadings of the parties, plaint, application Exh. 5, documents filed therewith and the affidavits as well as the objections of the defendant. The learned Trial Judge has also considered that the Mamlatdar has filed his objection at Exh. 20 that he has been wrongly joined as party and should be deleted and the matter was then taken up for consideration. The learned Trial Judge passed an order dated 06.03.2002 whereby application Exh. 5 was allowed and injunction as prayed for was granted till the disposal of the said suit. The learned Trial Judge has also ordered to delete the defendant No. 2 as party since he was wrongly joined in the suit.

6. Being aggrieved by the said order, the respondent

has filed an appeal under Section 104 read with Order 43, Rule 1(r) of the Civil Procedure Code before the Court of the District Judge and the same was heard by the learned Joint District Judge, 1st Fast Track Court and allowed the appeal being Civil Misc. Appeal No. 09 of 2002 and set aside the order dated 06.03.2002 rendered by the learned Civil Judge (S.D.), Anjar below an application Exh. 5 in Regular Civil Suit No. 72 of 2000.

7. It is this order of the learned Joint District Judge which is under challenge in the present petition.

8. Mr. Hardik Soni, learned advocate appearing for Mr. Harin Raval for the petitioner submits that the order and judgment passed by the Appellate Court is contrary to law, proved facts and evidence on record and deserves to be quashed and set aside. He has further submitted that the learned Appellate Court has clearly erred in law in accepting the argument of the respondent that there was no pleading to

support the case of the prosecution that the easementary right was enjoyed by him for more than 20 years without interruption. As a matter of fact, the petitioner has made specific averments in the plaint as well as in the application for injunction to the effect that right of way to reach petitioner's field from the said way was enjoyed continuously and without any interruption for more than 20 years. He has further submitted that the learned Appellate Court has erred in holding that in absence of a declaration that the right of way is acquired by prescription as easementary right, no such relief can be granted. While coming to this conclusion, the learned Appellate Court has clearly misred the prayer prayed by the petitioner in the injunction application. The prayers made in the suit very clearly declare that necessary declaration is prayed for. It is not correct to hold that in the suit for injunction on the basis of prescriptive easementary right, the plaintiff has not sought necessary declaration from the Court that this right has been so acquired. He has further submitted that the conclusion and the

finding arrived at by the learned Trial Judge is not on the basis of presumption but on the basis of the documents and it is especially so when it has been recorded in the order dated 06.03.2002 that after considering the documents produced by the plaintiff at mark 3/1 to 3/7, the plaintiff has successfully proved that the suit way in question has been used regularly and uninterruptedly and continuously for a period of more than 20 years. Mr. Soni has further submitted that once the plaintiff/petitioner proved prima facie case and the fact as averred in the plaint and the injunction application that the suit way was used by way of prescriptive easementary right for more than 20 years, uninterruptedly and without obstruction for at least a period of more than 20 years and though the plaintiff-petitioner had alleged, averred and proved that there was no way to reach the petitioner-plaintiff's field, the aspect of balance of convenience and irreparable loss and injury was automatically proved since, if after providing prima facie case, injunction in favour of the plaintiff is not granted, then irreparable loss and injury would be

caused to the petitioner – plaintiff. He has, therefore, submitted that the order of the learned Appellate Court is contrary to the provisions of law and against the decided case law on the subject of easementary right and granting of injunction and hence, it is required to be quashed and set aside and the order passed by the learned Trial Judge below an application Exh. 5 deserves to be restored.

9. To get the support and strength for the submissions of Mr. Soni, reference is made to the decision of Punjab High Court in the case of **Hari Chand vs. Gordhan Das, reported in AIR 1957 Punj 238**, wherein it is held that to prove the right of easement acquired by prescription it should be shown that the person claiming the right was in peaceful, open and uninterrupted enjoyment of the right for a period of twenty years lasting within two years of the suit. Reference is also invited to the decision of Karnataka High Court in the case of **Gurupadagowda S. Patil vs. Basavannappa, reported in ILR (1978) 2**

Kant. 1050, wherein it is held that the Court should find, as a matter of fact, whether the alleged right of way was enjoyed as an easement peaceably and openly and peaceably and without interruption and for 20 years. If it is used openly and peaceably and without interruption, it is presumed that it was used as of right. Submission is therefore made that even though the plaintiff bases his claim to the right of pathway on immemorial use he would still be entitled to a decree if he establishes that he has acquired the right of pathway by prescription under S.15 by 20 years' user. The fact that right by prescription under S.15 was not specifically pleaded would not disentitle the plaintiff to a decree.

10. Mr. Bhushan Oza, learned advocate appearing for the respondent on the other hand, strongly supported the order passed by the learned Joint District Judge. He has submitted that the finding of the learned Trial Judge to the effect that the plaintiff petitioner has proved the prima facie case is not

germane from the facts of the case and also not in accordance with law. He has submitted that the claim of the plaintiff/petitioner is that he has acquired the right of easement by way of prescription. Whenever a right of way acquired by prescription is pleaded, the pleading must be precise and it should be specific. The plaintiff in such a case must plead that the easement so claimed and has been enjoyed by him for more than 20 years without interruption and as that of right. Mr. Oza has further submitted that though the plaintiff has pleaded that he is using the way from the field of the respondent for more than 20 years, nowhere in the plaint or in the application it has been pleaded that such right was enjoyed as of right. The petitioner-plaintiff must aver that he is using the said way as of right. Non-mentioning in the plaint itself is fatal to the right pleaded by him. Mere using the way for 20 years is not sufficient for acquiring the easement on the property of other. Mr. Oza has further submitted that even if it is believed that the plaintiff-petitioner has been using the way on the ridges or mend

between the two fields for going to his field, such user is permissive and it cannot be said that the person is using the way as of right. In support of this submission, he relied on the judgment of the Allahabad High Court in the case of **Vidya Sagar and another V/s. Ram Das and another, AIR 1976 Allahabad 415** wherein it is held that it is common, for one cultivator to pass over the Mend of another cultivator as a means of access to his own field and such user of the Mend for agricultural purposes is, generally speaking, never objected to and is, therefore, nothing but permissive. No easementary right, therefore, can be acquired by use of a Mend as a passage unless there is clear evidence of such user as a matter of right.

11. Mr. Oza has further relied on the decision of the Allahabad High Court in the case of **Smt. Balley and another V/s. Rama Shanker Lal and others, AIR 1975 Allahabad 461** wherein it is held that the owner of land using the ridges between adjoining

fields of his neighbour, for reaching the road cannot be presumed to have used it as of right. The user can be presumed only to be permissive. No right of easement can be claimed on the basis of such user. It is a common feature in Indian villages that plea generally pass over the ridges between two cultivated lands, and by habit no agriculturist ever objects to it.

12. He further relied on the decision of the Madhya Pradesh High Court in the case of **Heera Bai and others V/s. Thakuri (Deceased by L.Rs.), AIR 1998 MADHYA PRADESH 273** wherein it is held that in order to establish the right of pathway that has ripened into right of easement, it must be shown that the enjoyment was as of right peaceable and open without interruption that took over a period of 20 years, attributable to any permission on the owner's part. According to the conditions in India, there is a presumption that the user is permissible and the person claiming the right must prove the

acquisition of such right under Section 25 of the Limitation Act, 1963 or Section 15 of the Easement Act. Then only a plaintiff can obtain a decree.

13. Mr. Oza has further relied on the decision of the Hon'ble Supreme Court in the case of **Chapsibhai Dhanjibhai Dand V/s. Purushottam, AIR 1971 S.C. 1878** wherein it is observed that to establish a prescriptive acquisition of a right, one must prove that the use was permissive. That he was exercising that right on a property treating it as someone else's property. In fact, any assertion of a hostile claim of certain rights over another men's property and in order to acquire the easement, the person who asserts the hostile claim must prove that hostile claim on a property which is not his own and where no such consciousness is proved, he cannot establish a prescriptive acquisition of the right.

14. Mr. Oza has further submitted that the right of easement acquired by prescription under Section 15

of the Easements Act cannot become ripe unless and until such right is contested and also adjudicated by the competent Court. For this purpose, the plaintiff has to ask for the declaration that he has acquired the right of way by prescription. If such prayer is not asked in the suit, the Court cannot grant any relief either of the permanent injunction or any type of injunction and also cannot pass any interim order. He has submitted that as per the pleadings of the plaintiff – petitioner, he has not made any such averment and he has not asked such declaration as the relief in the suit and his suit is, therefore, liable to be dismissed.

15. Mr. Oza has further submitted that the easement can be acquired by three known modes :- (i) by express or implied grant (ii) by user as of right for the statutory period of 20 years under the Easements Act i.e. by prescription and (iii) by immemorial user based upon the action of a lost ground. For the second mode of acquisition of

easement under the Easements Act, it is necessary that the required period of 20 years or more must end within 2 years next before the institution of suit wherein the claim to the easement is contested. This necessarily implies that the right of easement by prescription under the Act cannot become absolute unless the right has been contested in a suit.

16. Mr. Oza has further relied on the decision of the Madras High Court in the case of **Muthu Goundan V/s. Anantha Goundan, AIR 1961 MADRAS 1001** wherein it is held that the question when what might be called an easement by statutory prescription is claimed by the plaintiff, is whether under Section 15 of the Easements Act, the prescriptive right by enjoyment for 20 years has been acquired by the plaintiff. The fifth paragraph of Section 15 of the Easements Act seems to render it impossible to acquire a statutory prescriptive title to an easement unless and until the claim thereto has been contested in a suit.

17. In the case of **Siti Kantapal V/s. Radha Gobinda Sen, AIR 1929 CALCUTTA 542**, it has been authoritatively held that a title to easement is not complete merely upon the effluxion of the period mentioned in the Statute viz., 20 years and that however long the period of actual enjoyment may be, no absolute or indefeasible right can be acquired until the right is brought in question in some suit, and until it is so brought in question, the right is inchoate only and in order to establish it when brought in question, the enjoyment relied on, must be an enjoyment for 20 years up to within 2 years of the institution of the suit. It is, therefore, necessary that in a suit for injunction based on a prescriptive easement right, the plaintiff should seek for a declaration from the Court that he has so acquired the prescriptive right of easement. In the present suit, since the petitioner-plaintiff has not sought for declaration that he has acquired prescriptive right of easement with regard to the inflow of air and light

through the windows and ventilators. Without more, therefore, the suit is liable to be dismissed.

18. Mr. Oza has further submitted that it is for the petitioner – plaintiff to prove that he has enjoyed and used the way uninterruptedly and without obstruction and for the continuous period of more than 20 years. He has further submitted that the conclusion or finding given by the learned Trial Judge is based only on the presumption. The Learned Trial Judge on the basis of the revenue record has come to the conclusion that because the name of the plaintiff is in the revenue record, the plaintiff has prima facie case. Lastly, Mr. Oza has submitted that the Learned Appellate Court has come to the right conclusion which is based on the settled legal principles of law and mere using a particular way for 20 years does not confer any right on the person claiming such right by prescription. The said order does not require any interference by this Court. He has further submitted that even the

finding given by the learned Appellate Court to the effect that the petitioner – plaintiff has not asked for declaration of his right and mere suit for injunction is not maintainable, is also not required to be interfered with. He has, therefore, submitted that the injunction was rightly refused by the learned Appellate Court and while exercising the writ jurisdiction under Article 227 of the Constitution of India, the said order of the learned Appellate Court does not deserve any interference by this Court as it is neither perverse nor unreasonable. It is not in excess of jurisdiction or it is not in violation of the principles of natural justice. Taking any view of the matter, the petition deserves to be dismissed.

19. After having heard learned advocates for the respective parties and after having gone through the order passed by the learned trial Judge as well as the Appellate Judge and after having considered the authorities cited before the Court, the Court is of the view that the learned Jt. District Judge is not justified

in interfering with the order passed by the learned trial Judge and thereby allowing the appeal of the present respondent – original defendant. Despite the fact that the learned Jt. District Judge has observed in his order under challenge that generally the Appellate Court is reluctant to interfere in the discretion of the Lower Court, he interfered after observing that in the present case the trial Judge has ignored the said principle and has also not exercised his discretion judicially based on the settled principle of law and as such this is the fit case where this Court should interfere with the discretion of the learned trial Judge. These observations of the learned Jt. District Judge are contrary to the facts and evidence on record and against the settled principles of law, equity and justice. The learned trial Judge has specifically held that after considering the fact stated and averments made in the application as well as after appreciating the evidence led before him that the petitioner / original plaintiff has been using the suit way in question regularly and uninterruptedly and continuously for a

period of more than 20 years and once the petitioner / original plaintiff proved prima facie case and the fact as averred in the plaint and in the injunction application that suit way used by way of prescription easementary right for more than 20 years, uninterruptedly and without obstruction for at least a period of more than 20 years and though the petitioner – original plaintiff has alleged, averred and proved that there was no way to reach the petitioner's – plaintiff's field, the aspect of balance of convenience and irrepairable loss and injury was automatically proved. It is, therefore, not correct to state that all the three celebrated principles of granting an injunction have not been satisfied by the petitioner – original plaintiff. The learned trial Judge has further observed in his order that the documents produced at Mark 3/1 to 3/7 clearly establish that the plaintiff has been using the suit land for the last more than 20 years. Not only this, even affidavit of Sandha Bechra Bau and Devda Madeva Govind were filed in support of the petitioner's submission, wherein it is specifically stated that the petitioner as

well as his father and grand-father have been utilising the suit way while going to the field. This Court is, therefore, of the view that though the petitioner – original plaintiff has based his clam to the right of pathway on immemorial use is still entitled to a decree as he has acquired the right of pathway by prescription under Section-15 by 20 years' user. The Court is not persuaded to accept the submission of Mr. Oza that right by prescription under Section-15 was not specifically pleaded. The Court, therefore, at the interim stage would not hold that the plaintiff is not entitled to a decree as prayed for.

20. Taking any view of the matter and considering the entire facts and circumstances of the case, the present petition filed by the petitioner – original plaintiff challenging the order of the Appellate and Jt. District Judge deserves to be allowed and accordingly it is allowed. The impugned order passed by the learned Jt. District Judge is hereby

quashed and set aside and the order of the learned trial Judge is restored to the file. The petition is accordingly allowed. Rule is made absolute without any order as to costs.

(K. A. PUJ, J.)

savariya